

plaintiff" and in paragraph 5 the defendant pleaded that the plaintiff had no claim to ask the defendant for a "transfer" of the land.

From a mere perusal of the pleadings it is obvious that the impression the defendant wished to convey was that he had agreed to execute a transfer but was not liable to do so. The plaintiff while giving evidence stated: "When the agreement was entered into the defendant told me that the said land belonged to him." The plaintiff was not at all cross-examined on that. This was evidence of clear representation by the defendant that the land in fact did belong to him and it was he who was going to execute the transfer. The defendant stated in court that he was only acting as a broker. He did not say so in his defence. The plaintiff had called the Assistant Collector of Land Revenue, Lumut, as his witness who stated that the land in question, i.e., Lot No. 11873 stood in the name of one Ismail bin Yusof on 12th April 1971 and that there was a restriction imposed upon the said land that it could not be sold, charged, leased or transferred without the prior written permission of the Mentri Besar. Even if the defendant was allowed the latitude to go outside his pleadings and to allege that while contracting with the plaintiff he was only acting as an undisclosed agent for Ismail bin Yusof, the question which arises in this case is the application of section 186 of the Contracts Ordinance, 1950 which says:

"186. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable."

Bowstead in his *Law on Agency* (Twelfth Edition) at page 257 says:—

"Every agent who contracts personally, though also on behalf of his principal, is personally liable, and may be sued in his own name, on the contract, whether the principal be named therein, or be known to the other contracting party, or not, and either the principal or agent may be sued, unless the other contracting party elects to give exclusive credit to the principal. But no agent is personally liable on any contract made by him merely in his capacity of an agent, even if he make it fraudulently, knowing that he has not authority to do so."

Exhibit P1 nowhere indicates that the defendant was entering into an agreement with the plaintiff as an agent. *Bowstead* again in article 116 at page 266 of the same edition goes on to say:

"The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note, or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction whereof is a matter of law for the court—

(a) if the contract be signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appears from other portions of the document;...."

Nowhere in his evidence did the defendant suggest that he was the agent of Ismail bin Yusof.

Section 66 of the Contracts Ordinance deals with unjust enrichment and reads:

"66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

A I think this was a clear case of the application of section 66 of the Contracts Ordinance. The defendant had entered into an agreement representing to the plaintiff that he was in a position to transfer the land to the plaintiff. The plaintiff subsequently found that the defendant was in no position to do so as he had no title to the land.

B The learned magistrate seemed to have attached too great an importance on the non-production of Mr. C. C. Goh as a witness for the plaintiff. Even if the plaintiff did not go to the office of Mr. C. C. Goh and the defendant did present himself there, it should have made no difference whatsoever to the position in law as the defendant was at no time able to execute the transfer in favour of the plaintiff. There was no suggestion that Ismail bin Yusof was ready and willing to execute the transfer and apply for the requisite permission from the Mentri Besar.

C The appeal is allowed and the order of the learned magistrate set aside. There will be an order that the defendant repay the plaintiff the sum of \$1,200. The plaintiff will have the costs of the appeal and also the costs in the court below.

Appeal allowed.

Solicitors: *Yoon, Woon & Yeow; Ngan & Co.*

SETIA USAHA TETAP KEMENTERIAN PELAJARAN v. COLLECTOR OF LAND REVENUE, BUTTERWORTH

[O.C.J. (Chang Min Tat J., I.W. Hake and K. Mushir Ariff,
Assessors) June 24, 1972]

[Penang — Land Acquisition Reference No. 1 of 1971]

G *Land Laws — Compulsory acquisition — Objection to award of collector — Reference to court — Determination of 'market value' — Land Acquisition Act, 1960, Part V, ss. 37 and 41(3).*

This was a reference to court under the provisions of Part V of the Land Acquisition Act, 1960, objecting to the collector's award in respect of the acquisition of certain lands.

H The landlords demanded \$15,000 per acre but were only awarded \$8,500. In assessing this compensation, the collector rejected the evidence of private sales in the light of the evidence of prices paid by the Government.

There were two unusual features to the case. In the first place, the objection to the collector's award was not made by the landowner but by the appellant on behalf of the Ministry of Education for whom the land was acquired. Secondly, the collector appeared as a party in the proceedings.

I **Held**, (1) the First Schedule to the Land Acquisition Act, 1960 contains the principles relating to the determination of compensation and makes the market value the main determinant, subject to certain considerations. The collector was not right in ignoring the evidence of sales of other lands in the same locality that were clearly shown to be between parties, not trammelled by any provisions of law and not under colouration of acquisition;

(2) on the whole of the evidence and the considered opinions of two experienced assessors, the collector's valuation of \$8,000 per acre would be reduced to \$6,000 per acre.

Case referred to:-

- (1) *Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore* [1954] M.L.J. 69.

LAND REFERENCE.

Abdul Razak bin Dato' Abu Samah (Senior Federal Counsel) for the appellant.

Abu Talib bin Othman (Legal Adviser, Penang) for the respondent.

P. T. Oon for the landowner.

Cur. Adv. Vult.

Chang Min Tat J.: One of the two unusual features of this reference to court under the provisions of Part V of the Land Acquisition Act 1960 was that the objection to the collector's award was made not by the landowner but by the Setia Usaha Kementerian Pelajaran on behalf of the Ministry of Education for whom the land was acquired. The specific statutory provision is section 37(3) of the Ordinance. In accordance with the provisions of section 43(d) of the Ordinance, the collector was served with the necessary notice in Form P and he duly appeared, very much, as the respondent. The landowner had however consented without protest to receive the payment of the compensation awarded after due inquiry by the collector and the registry of this court in accordance with the exception in section 43(c) did not consider it necessary to serve the same form on him specifying the date of the hearing and directing his appearance before the court.

The result was that at the first hearing, the landowner was not present. Inche Abu Talib bin Othman, Legal Adviser for Penang, appearing on behalf of the collector, wholly supported by Inche Abdul Razak bin Dato' Abu Samah, Senior Federal Counsel for the Ministry of Education, submitted initially that the exception in section 43(c) might well be a *lacuna* in the law, in that the reference might possibly, especially if the court should be of the opinion after hearing the evidence adduced that the award was too high and had to be reduced, affect the interests of the landowner and that the failure to serve the landowner with the notice of the reference and to give him an opportunity of being heard must then be seen to violate a basic requirement of natural justice. The hearing was accordingly adjourned and in due time the landowner appeared. He was represented by counsel.

The other unusual feature was the appearance of the collector as a party in the proceedings. This was apparently in accordance with the provisions of section 43(d) which provided that where the objection was in regard to the area of the land or to the amount of the compensation, the collector was to be served with the notice of the reference and directed to appear before the court at the hearing. There is therefore justification for the appearance of the collector and also perhaps for the intitlement of the reference as being between the objector who would normally be the landowner or the authority for whom the land was being acquired as applicant and the collector as respondent. My duty is of course to apply the law as enacted by Parliament but in view of the entirely invidious position in which the collector in this particular

A case found himself and the embarrassment caused to him, I did at the hearing and still do wonder whether sufficient thought had been given to this unique provision of the law, requiring an adjudicating officer, who had exercised judicial functions and made a judicial decision in the statutory enquiry before him under Part II of the Ordinance, to appear in person as a respondent in subsequent proceedings in the High Court which though a re-hearing, were very much in the nature of an appeal to justify and defend his decision. The position is inherently embarrassing. It was clearly so in this case. It would have been more so, if learned counsel for the acquiring authority had not been generous enough to accept the suggestion of the court that instead of attempting to wring an admission of error from him, he could achieve his full purpose by limiting his cross-examination to elicit the bases for the collector's award in order to obtain sufficient ground for submission to the court that the award was wrong in law and principle. In my considered view, however, there was with respect no need for cross-examination at all, or even for his evidence in chief, as there were the written grounds of the collector for his determination of the amount of compensation. The provision for the written grounds of decision lies in paragraph 8 of Form O, which is the requisite form for reference to the High Court. If in the form the space provided was too limited for a full judgment, the collector could write out his grounds of decision and affix his decision as an annexure to the form. The collector in this case did so. The form itself envisaged this necessity and specifically provided for annexures. There was therefore sufficient material for any party so minded to attack the assessment as being excessive or inadequate without having to crucify the collector in the witness box. The decision of the collector stood to be upheld or revised by the reviewing court on the grounds as stated by him. For myself, I know of no similar position where an adjudicating officer is required to defend his decision in person. No magistrate or judge against whose decision an appeal had been lodged is ever expected to do more than write a reasoned decision. It would be intolerable if he were bound by law to appear in person before the appellate court to defend his decision or the validity of his appreciation of the evidence, his application of the law and his reasoning. Indeed in no court of law or judicial enquiry that I know of has there been thought to be such a necessity. And to my mind, by the same token, it should not have been necessary to require the adjudicating officer in an enquiry for the purposes of compulsory land acquisition to be named and to appear as a respondent.

I now turn to the matter under reference to this court.

The land that was acquired was comprised in 4 lots (Lots 1040, 1041, 1042 and 1046) situate in mukim 8, P.W. North (hereinafter referred to as the acquired land) and it lies south of the town of Kepala Batas. It was acquired for the Ministry of Education for a school. The southernmost boundary of the land abuts a road, Jalan Lahar Bubu, giving it a frontage of approximately 930 feet. This road is obviously meant to replace that part of the present trunk road to Alor

Star that runs through Kepala Batas and to form incidentally a bye-pass road that would relieve north-south traffic from the bottle-neck of Kepala Batas. It would not perhaps be wrong to say that it was reasonably anticipated that there would be some development of this area and it was hoped not merely to encourage this development but also to direct such development that this road was constructed. Along this road, about 50 chains north of the acquired land a junction has been constructed. The west arm of this cross-road leads to the town of Kepala Batas. The east arm is, at present, a *cul-de-sac*, or rather it peters out into an estate road but it is anticipated that when the projected development materialises, it will form part of the arterial road system leading to the south.

This northern junction which is about 24 chains from the main cross-road of Kepala Batas is in the centre of an area of some development. There is the Sim Hin Garden Housing Estate. A Chinese school and an English school are also sited somewhere near this junction. Along the east arm, there have been built on lands previously acquired a children's home, staff quarters for an agricultural test station, a fire brigade base and a health centre. Two other pieces of land have also previously been acquired for a secondary national-type school and for a children's home. The latter has now been re-sited. The school remains to be built.

Another junction has been built some 8 chains to the south. The west arm leads to the present road that provides access to Kepala Batas and land has also been acquired to provide for the widening of this road. The east arm of the cross-road is similarly rudimentary but at this east side of the junction, a piece of land, Lot 1246, has previously been acquired for a low-cost housing estate.

At the enquiry before the Collector of Land Revenue, evidence was first adduced by Inche Lazim bin Taha, Settlement Officer of Province Wellesley North. He gave a short description of the land to be acquired. It was outside the town limit of Kepala Batas. Then he said that in his view the price for the land to be acquired could be compared with the price paid by Government for the acquisition of the nearby Lot 1246. It was \$8,000 per acre in March 1968. Inche Lazim also referred to the acquisition of the site for the children's home Lot 762, opposite the fire station, for which a price of 25 cents per square foot, i.e. \$10,890 per acre, was paid.

The next witness was Inche Choong Kok Sin, valuation officer for Penang. His evidence was to the effect that lands in the neighbourhood were sold from 1965 to 1969 at between \$2,000 to \$4,000 per acre. He considered that the price of \$8,000 per acre for Lot 1246 to which was added \$1,000 per acre for severance was too high. This particular lot was acquired under what was termed a crash programme for low-cost houses and was never referred to his department for valuation. In his estimation the acquired land was worth at about \$5,000 per acre.

The landlords demanded \$15,000 per acre.

On this evidence, the collector made an award of \$8,500 per acre. He was very clearly influenced

A by the price of \$8,000 paid, one must presume, willingly by the Government for Lot 1246 for the crash programme low-cost houses, only some 200 yards away from the acquired land.

B When he came to write his grounds of decision, the collector also referred to the price of \$10,890 per acre paid for Lot 762 for the children's home. He rejected the evidence of private sales in the presence of the evidence of prices paid by Government.

C Speaking for myself, I can see the reason for the collector's reliance on the two Government awards to the exclusion of any consideration for the private sales. If Government with its known determination not to pay more than the market value of the land for acquisition and armed not only with statutory powers but also with a fairly elaborate machinery to save itself from exorbitant demands could consider a price of between \$8,000 to \$10,000 per acre as being fair for land in this locality and was willing to pay this price and in the presence of the evidence of Inche Lazim bin Taha, then this price must be considered D to represent the reasonable market-price. The assessment at a lower figure made by the valuation officer could not detract from the figure accepted previously by Government.

E As I have just said, this reasoning was not without apparent justification. But, of course, the collector was not right in ignoring the evidence of sales of other lands in the same locality, sales that were clearly shown to be between parties not trammelled by any provisions of law and not under colouration of acquisition. These were sales that were clearly at arms' length. However, it must be said that if he was wrong, the collector was badly advised.

F The First Schedule to the Land Acquisition Act 1960 contains the principles relating to the determination of compensation and makes the market value the main determinant, subject to certain considerations. There are a fair number of judicial decisions on what represents the market value which must be regarded as of some considerable guidance since there is no definition or interpretation of market value in the Act. G It is however not necessary to refer to all of them. Indeed I find the best guide-lines in the judgment of Buhagiar J. in *Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore*⁽¹⁾ at page 71 which is a decision on parallel legislation. As was said by the learned judge:

H "The recognized methods of valuation of land acquired under land acquisition legislation may be classified under three heads:—

- (1) the opinion of experts or valuers;
- (2) the price paid, within a reasonable time, in *bona fide* transactions of purchases of the lands acquired, or of the lands adjacent to the land acquired and possessing similar advantages; and
- I (3) a number of years' purchase of the actual, or immediately prospective, profit from the lands acquired."

Of these three methods, the learned judge considered that the safest guide to determine the fair market value was evidence of sales of the same land or similar land in the neighbourhood after making due allowance for all the circumstances.

If regard is paid to such sales, then it will be seen that the range of \$8,000-\$10,000 represents one extreme and the range of \$2,000-\$4,000 the other end. Further if consideration is paid to the fact that the anticipated development of the locality has not taken place or has not taken place at the rate once thought of as possible and reasonable, then the conclusion must regrettably be reached that the award of the collector errs on the high side.

I have not only the benefit of a more extended hearing and rather fuller evidence but, what is of greater value, the considered opinions of two very experienced assessors. After discussions, we have agreed on a figure of \$6,000 per acre.

I therefore revise the Collector of Land Revenue's valuation by reducing his figure of \$8,500 per acre to \$6,000 per acre. There shall be no order as to costs.

Under section 41(3) I award \$300 to each assessor for their several attendances in court. Apart from their attendance, they have by themselves made personal inspection of the land.

It only remains to thank the assessors, Inche I. W. Hake and Tuan Haji K. Mushir Ariff and the several counsel for their great assistance to me.

Order accordingly.

Solicitors: *Lim, Lim & Oon.*

OTHMAN & ANOR. v. MEK

[F.C. (Ong C.J. (Malaya), Ali and Ong Hock Sim F.JJ.)

July 7, 1972]

[Ipoh — Federal Court Civil Appeal No. 87 of 1971]

Practice and Procedure — Appeal — Cause of action — Plea of res judicata — When applicable.

Land Laws — Jual janji — Claim for execution of transfer of land — Limitation — National Land Code, s. 417(1).

Limitation — Right becoming unenforceable — Question of res judicata.

Evidence — Res judicata — Right in rem — Claim in personam.

This was an appeal from the decision of the High Court ([1971] 2 M.L.J. 214) which had dismissed the plaintiffs' claim for a declaration.

The appellants, legal personal representatives of the late Haji Ahmad, claimed for a declaration that the respondent, as registered proprietor of a half undivided interest in two parcels of land, held the same in trust for the appellants. The material facts were that in Civil Suit No. 120 of 1958, the plaintiff, Haji Ahmad, sued for specific performance of a *jual janji* agreement. He pleaded the contract, full payment of the agreed price and his being given possession of the lands and titles thereto upon making such payment. The relief claimed by him from the defendant (who was the respondent's late husband) was the execution of a transfer of the lands in his favour. The present appellants' pleaded that after such payment, the respondent remained on the land register merely in the capacity of trustee, and was bound by law to convey the said lands to the rightful beneficial owner.

In the court below, the claim was defeated by a plea of *res judicata* by virtue of a judgment of the Court of Appeal in *Mek v. Haji Ahmad*.⁽¹⁾

The question before the Federal Court was whether the appellants' rights could be defeated by the judgment of the Court of Appeal.

A Held, by a majority, allowing the appeal: the appellants were entitled to the declaration, as prayed, and for the consequential relief that the proper registering authority do cause the necessary entries and memorials to be made in the issue and register documents of title for the appellants to be registered as proprietors of the lands concerned in respect of the undivided interests as claimed.

B Per Ong C. J. (Malaya), allowing the appeal: "The plea of *res judicata* was wholly misconceived. The Court of Appeal, in effect, affirmed the decision of the lower court relating to the substantive rights of the appellants, and reversed the learned judge on a pure question of procedure relating to limitation.... my opinion is that the trial judge in this case was bound by that part of the judgment of the Court of Appeal — regardless of its views on the unenforceability of the *jual janji* agreement — as decided that Haji Ahmad must be accepted as the equitable owner of the lands. No question of *res judicata* — concerning limitation only — can possibly derogate from the judgment establishing the rights of the purchaser. This vital part of the judgment was wholly ignored or overlooked by the trial judge.... What the appellants now seek is not specific performance of the agreement, but the muniments of title successfully established in court — which, as a cause of action, is a horse of a totally different colour from that pleaded in Civil Suit No. 120 of 1958".

D Per Ali F. J., dissenting: "The series of facts relied upon by the appellants for their present claim are substantially the same as those relied upon by the plaintiff in the 1958 Civil Suit. They are being deployed now by the appellants to support a claim under a different name which is an abuse of the process of the court, and contrary to the principle that in the public interest there should be an end to litigation. In this case, the plaintiff had only one cause of action founded on the right, contractual or equitable, to have the lands transferred to him. As the learned trial judge was only concerned with the question whether the appellants were estopped from taking further action, it is only right that the case should go back to the High Court to be disposed of on the merits".

E Per Ong Hock Sim F. J., allowing the appeal: "The appellants assert their title and interest, which is a right in *rem*, to the lands. *Res judicata* only bars specifically the appellant's claim in *personam*.... the court has powers now under section 417(1) of the National Land Code to make such order as it thinks just and proper.... the maxim to be applied is *ubi jus ibi remedium*".

F Cases referred to:-

- (1) *Lysaght v. Edwards* (1876) 2 Ch. D. 499, 506.
- (2) *Henderson v. Henderson* (1843) Hare 100, 115; 67 E.R. 319.
- (3) *Holmes v. Crowther* [1970] 1 W.L.R. 835.
- (4) *Duedu v. Yiboe* [1961] 1 W.L.R. 1040.
- (5) *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] 2 W.L.R. 150.
- (6) *Mek v. Haji Ahmad* [1960] M.L.J. 133.
- (7) *Brunsdon v. Humphrey* (1884-85) 14 Q.B.D. 141.
- (8) *Greenhalgh v. Mallard* [1947] 2 All E.R. 255.
- (9) *Hoystead v. Commissioner of Taxation* [1926] A.C. 155.
- (10) *Howlett v. Tarte* (1861) 10 C.B.N.S. 813.
- (11) *New Brunswick Railway Co. v. British and French Trust Corporation Ltd.* [1939] A.C. 1.
- (12) *Thoday v. Thoday* [1964] 1 All E.R. 341.
- (13) *Bolo v. Koklan & Ors.* L.R. 57 I.A. 325, 331.
- (14) *Nasri v. Mesah* [1971] 1 M.L.J. 32, 34.
- (15) *Williams v. Greatrex* [1957] 1 W.L.R. 31, 36.
- (16) *Mills v. Haywood* (1877) 6 Ch. D. 196, 202-3.
- (17) *Bridges v. Mees* [1957] 2 All .R. 577.
- (18) *Bachan Singh v. Mahinder Kaur & Ors.* [1956] M.L.J. 97, 98.

FEDERAL COURT.

Lim Kean Chye (A. Jayadeva with him) for the appellants.